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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE, Plaintiff and Respondent, v. PHILIP NEIL LESTER et al., Defendants and Appellants.	C083333 (Super. Ct. Nos. SF13026A, SF13026B)

Defendant Philip Lester and his sister, codefendant Susan LaFerte, ran Gold Country Lenders (GCL), a business that engaged in private mortgage lending, including hard money loans. GCL lent money to real estate developers, with the loans secured by a deed of trust on the properties. In turn, GCL offered investments in these loans to investors who received a fractionalized interest in the note and interest in the range of 8 to 12 percent. For many years the business ran successfully and GCL claimed no investor lost money. That changed in the fall of 2008, at the time of the crash of the real estate market, when GCL's investors stopped receiving interest payments. Many of the properties were later sold at substantial losses. Investors lost well over a million dollars.

After a long investigation by the California Department of Justice, a grand jury returned an indictment charging defendants with one count of a fraudulent securities scheme (Corp. Code, § 25541),[1] 50 counts of selling a security by means of a material misrepresentation or omission (§§ 25401, 25540),[2] and 10 counts of fraud on an elder adult (Pen. Code, § 368, subd. (d)). A jury found Lester guilty on all but four counts and LaFerte guilty on 35 counts. The jury found true two enhancements: Penal Code section 186.11, subdivision (a)(2) (pattern of related felony conduct resulting in loss of more than $500,000), and Penal Code section 12022.6, subdivision (a)(3) (loss over $1.3 million). The trial court sentenced Lester to 15 years in prison and LaFerte to 9 years.

Lester and LaFerte appeal. They contend insufficient evidence supports the convictions because the transactions were not sales of securities, but instead were commercial loans secured by an interest in real estate. We agree as to many of the transactions.

The trial court instructed the jury to determine if the transactions involved the sale of a security using the federal *Howey* test. "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." (*SEC v. W.J. Howey Co.* (1946) 328 U.S. 293, 301.) As we will explain, as to some transactions, the People failed to prove there was a common enterprise. As to others, where the loan had adequate collateral in a deed of trust on real property, the People failed to prove the profits resulted from the efforts of others. Because the People

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[1] Further undesignated statutory references are to the Corporations Code.

[2] Section 25540, subdivision (b) provides for a fine of up to $10,000,000 or a sentence of two, three, or five years, or both for a violation of section 25401.

failed to prove that many of the transactions involved the sales of securities, we reverse those convictions.

Defendants contend there was insufficient evidence of material misrepresentations or omissions and LaFerte contends there was insufficient evidence she aided and abetted certain counts. Further, defendants claim instructional error, prosecutorial misconduct, duplicative counts, and that the Penal Code section 12022.6 enhancement should be stricken because the statute has been repealed. We find no merit in any of these contentions. We reverse both defendants' convictions in part and remand for resentencing as to Lester.

FACTS

Gold Country Lenders

Lester and his sister LaFerte were CEO and CFO, respectively, of GCL. Lester ran the office and LaFerte took over in his absence. Lester had final approval of business decisions. Lester and LaFerte provided the information that was included in the disclosure form sent to investors.

GCL did business in private mortgage loans, including hard money loans. GCL advertised the investments as "secure," and boasted it had been 100 percent successful for 20 years. Hard money loans carry both a higher risk and a higher interest rate. They provide a source of financing for borrowers who may not qualify for conventional loans. (North, *The Language of Loans* (2019) 41 JAN L.A. Law. 32, 34.) They are offered by private investors rather than commercial banks or other traditional lenders and carry a much higher interest rate than conventional loans. (*Mortgages: Hard Money* (2011) 40 Real Est. L. Rep. 6.) The lender looks to the value of the collateral relative to the loan amount rather than to the creditworthiness of the borrower. (*The Language of Loans*, *supra*, at 34.) The loan-to-value ratio (LTV) rarely exceeds 65 to 70 percent and most hard money lenders require a senior lien position so that they have first claim on the collateral in the event of a default. (*Mortgages: Hard Money*, *supra*, at 6.)

GCL lent money to real estate developers, with the loan secured by a deed of trust on the property. GCL then offered investors a fractionalized interest in the note, offering 8 to 12 percent interest. GCL did not solicit investors from the public; the investors at issue here were friends of Lester or LaFerte or referred by other investors. Many had invested with GCL for many years involving dozens of loans. The indictment named 37 investors as victims; most were married couples. Many of the victims were retired senior citizens.

Several investors claimed GCL told them the loans were safe and they would not lose their principal; Lester offered some a personal guarantee. Suzanne Hinman, an employee of GCL from 2003 to 2008, testified Lester and LaFerte instructed her to tell investors Lester would personally guarantee the loans, particularly if the investor was hesitant. No evidence of a written guarantee was presented at trial. The relationship between GCL and its investors was one of trust. Often, the investors asked few if any questions about the investment and some did not even read the paperwork.

The GCL transactions were accompanied by a disclosure form. Investors usually received this paperwork only after they had sent their money and, in some cases, it showed their loan was not in first position as they had believed. Thomas Pool, the assistant commissioner at the California Bureau of Real Estate, had created the form. The five-page form indicates the balance of the note the investor is receiving, the market value of the property, the dollar amount of senior encumbrances, the protective equity (the value of the property less encumbrances), and the total loan to value ratio. The transaction information sets forth the original principal, the investor’s share, the maturity date and interest rate of the note, and the priority of the security, as well as other information. The second page of the disclosure form sets forth the general maximum loan to value ratio for different types of property, from 80 percent for owner-occupied single residences, to 50 percent for land zoned for development (with subdivision approval, if required), to 35 percent for other real property. Part 8 of the form sets forth appraisal information. For most of the loans at issue, the disclosure form lists the fair market value according to the appraiser as $0.00 because there was no appraisal. Lester set the market value of the properties lacking appraisals.

Pool, the form's creator, testified the market value of the property on the form should be the value of the property "as it stands." The market value of the property was the "keystone" in determining risk. The LTV figure was the ratio of the value of the loan to the value of the property, the lower the ratio the more secure the loan.

Each investment was accompanied by a lender servicing agreement under which GCL was to receive a monthly loan servicing charge of 1.50 percent of the outstanding principal balance of the note. GCL agreed to maintain a trust account and not to commingle funds. GCL also received a broker's commission based on the total amount of the note.

Pool testified the loan broker has a fiduciary duty to the investor. It is a position of trust and the broker has to act in the best interest of the client. The broker's duties are not limited to the disclosure form. The investor would want to know if the broker had a potential conflict of interest, such as being a partner with the borrower. According to Pool, the investor had no affirmative obligation to investigate the degree of risk involved in the investment.

The Projects

The investments at issue were investments in loans that were secured by an interest in real property. The major real estate projects are described here. Other smaller projects are described as necessary in our upcoming discussion of defendants' claims.

Osborne Hill

Steve Elder was a developer who formed a partnership with Lester and Brian Bisnett. Elder would acquire land, Lester would provide the financing, and Bisnett would obtain the entitlements. In 2000 Lester and Elder bought 250 acres, the Osborne Hill project, in Grass Valley for $2.5 million. Osborne Hill was to be developed into a subdivision with single family lots and a condominium parcel for 20 units. Lester or GCL would pay the interest on the purchase loan. Interest reserves were built into the loans to pay the interest; a portion of the loan was held back to make the interest payments.

Elder suspected the property contained toxic substances when he purchased it because it was near the Empire Mine. The Department of Toxic Substance Control (DTSC) confirmed that cleanup was required and DTSC had to approve the work. The issue of the cleanup had to be resolved to DTSC's approval before development could be finalized. In 2004 the owners of Osborne Hill entered into a voluntary cleanup agreement. The agreement acknowledged the presence of arsenic, lead, and mercury on the property. The firm Holdrege and Kull was hired to perform the cleanup work. The original cost was approximately $750,000, but it was later reduced to $200,000. The cleanup was never performed and Osborne Hill was never developed.

Steven Becker, a senior engineer geologist for DTSC, testified Osborne Hill had concentrations of arsenic of up to 3100 milligrams per kilogram and concentrations of lead of 99 milligrams per kilogram. For a substance to be considered hazardous, the concentration level is 500 milligrams per kilogram for arsenic and 1000 milligrams per kilogram for lead. The DTSC never approved the final cleanup plan for Osborne Hill because there was no agreement on the removal of arsenic. Becker believed there was arsenic across the property.

Another problem with Osborne Hill related to the sewer system; the property needed a pressurized station. The owners requested that the sanitation district annex Osborne Hill, but due to a change in policy regarding septic systems, the sanitation district decided against annexation in 2009.

In 2006 Curtis Haidle purchased 33 acres of Osborne Hill as a favor to Lester so Lester could raise funds to continue the process of subdividing the remainder of the property. Haidle was a building contractor who had done business with GCL as a borrower. He had been involved in 30 to 40 loans with GCL. Haidle's plan for the 33 acres was to build a home on it and sell it, with some profit. GCL arranged the financing and Haidle paid $300,000 for the property. He borrowed $750,000; the remainder after the sales price was for building the house. GCL was responsible for all interest payments on the loan until the house was sold, as well as taxes and other costs. Haidle took two draws, $300,000 for the purchase and $5,000. The documents showed draws on the loan of $695,000; Haidle did not know where the rest of the money had gone. The County ultimately took the 33 acres to satisfy back taxes.

Lester did not tell Haidle about toxic substances on the property. When Haidle tried to get an onsite soil evaluation permit, the first step in building, he could not get it. Instead, the environmental health department effectively shut him down. Haidle called LaFerte, who told him they had someone working on the same problem on their property at the top of Osborne Hill and they would address his problem. They did not.

Osborne Hill sold before trial at a tax sale for $550,000.

Deer Creek Pines

Lester and Elder purchased the 360-acre property known as Deer Creek Pines for $1.3 million. They formed Deer Creek Pines, LLC to develop the property into 100 single family homes. Lester wanted to do the development to learn about development. Six of the seven parcels of the Deer Creek Pines property were known as Kenny Ranch; the two names were used to refer to the same property.

A dump was discovered across the street from the property. There were also six piles of waste rock that were a concern because they contained elevated levels of arsenic and lead. In 2001 there was a voluntary cleanup agreement for Kenny Ranch. DTSC never approved a cleanup plan and no cleanup occurred.

The City of Grass Valley (City) must approve developments within its limits. In 2001 Lester filed a plan for developing Kenny Ranch. The City's general plan envisioned annexing Kenny Ranch in 2016, with development to follow, although the

City understood Lester wanted annexation sooner. In 2006 the City's approval for development of Kenny Ranch was on hold. By March 2008 the City had not given approval for the development of Kenny Ranch to go forward. The majority of the property was not developed. A portion of the property was given to a hospice and a church was built. The remainder of the property was sold in late 2014 for $937,500.

Bullards Bar

Bullards Bar is over 2,700 acres of raw land fronting the Yuba River. A partnership of Lester, Milvn Browning, and Scott Leonhard owned the property. Browning testified the plan was to log the property to pay for the purchase and then to sell it or place a rock quarry on it. He would buy the lower piece of the property. After logging was finished, the property was put up for sale. Browning and Lester were "butting heads" over the sale of Bullards Bar. A public land trust offered $7.6 million to purchase the entire property but Browning did not want to sell to conservationists. He did not know Lester had investors in the property. Eventually, after the value of the land had diminished significantly, he agreed to sell the property to the public land trust for $3 million because he wanted the investors to get *some* money. The property was sold in the spring of 2014. Property taxes had not been paid for a few years; Browning paid $35,000.

Unbeknownst to Browning, Lester had used Bullards Bar as collateral for a $855,000 loan for the partial purchase of the Auburn Valley Country Club.

High Street

The High Street property, also known as Auburn Towers, was an office building in Auburn. The plan was to convert it into smaller units that were to be sold as office condominiums. GCL hired a construction manager; a construction permit was pulled in March 2005. There were delays, including a redesign to accommodate the HVAC system, heavy rain in March 2006, and a contractor who failed to pursue construction to meet the original schedule. A listing agent prepared a pro forma listing for the property in 2008 or 2009, "in one of the worst markets that we saw in thirty years." Despite some interest, there were no offers.

The property went into foreclosure and sold at a trustee's sale in 2009 or 2010. Three months before trial in 2015, the High Street property was 50 to 70 percent built out into finished dental condominium units.

Investigation

The Bureau of Investigation in the California Department of Justice conducted an investigation of GCL. The Bureau executed a number of search warrants, including for Lester's home, LaFerte's home, and two banks. They could not search GCL's business office because it had closed.

During the search of Lester's house, agents interviewed Lester. Lester claimed that for 20 years when a loan went bad he would step in and take over the loan. He sold the properties and kept paying the investors, using money from the servicing fees. When asked how things could go wrong, Lester said loaning $600,000 to a golf course (Auburn Valley Country Club) was his "single biggest economic mistake." When the owner defaulted in 2004, Lester had $800,000 invested and should have walked away. Instead, he used everything he had to keep it going, but lost it anyway. He also spent thousands of dollars on attorneys fighting the DTSC. Lester told an agent, "I didn't turn a crook overnight. It took me 20 years."

Defense Case

The defense was that the real estate market crash of 2008 was the reason for the investors' losses. Defendants presented two appraisers who testified about the fluctuating values of the properties. David Jarrette had been hired by Trust for Public Lands to provide a valuation of Bullards Bar. In his opinion, the value of the property in 2007 was $7,580,000. He performed a second appraisal in 2012; his estimation of its value dropped to $3,800,000. Monte Short, a commercial real estate appraiser hired for trial, agreed with Jarrette's valuation of Bullards Bar.

Short performed analyses of the value of various properties for several dates relevant to the trial. He valued the properties both "as is" and at the aggregate retail sales value, which is the value when development is completely finished and the lot is ready for building. Short's valuations are discussed in more detail *post*.

Michael Malloy, a professor at Pacific McGeorge School of Law, testified for the defense as an expert on federal and state securities law. He briefly explained the real estate market meltdown in 2008. He testified it was due to two trends, a belief in market elasticity that produced subprime loans and securitizing those loans to make more loans. Lenders, especially in the retail real estate market, believed the market was changing. Instead of lending only to creditworthy persons who could carry a loan for 20 to 30 years, they began to look to the value of the appreciating property and lend money to persons who were less creditworthy. But after a few years the interest rate on these loans reset and as more of these loans were generated, the market slowed. Lenders believed the market would continue to grow and wanted to get these loans off their books. They combined the loans into a pool and sold interests in that pool. But the borrowers did not sell the properties in three or four years as expected; instead, they defaulted on their loans and the value of securitized mortgages dropped. In 2008 a large investment bank, Lehman Brothers, collapsed, as well as Washington Mutual, one of the biggest subprime lenders. What had seemed like a safe investment was no longer safe and the entire real estate market, not just the retail portion, slowed down and eventually stalled.

Malloy defined a Ponzi scheme as an offer of an investment at a higher rate of return where the payments to the earlier investors came from later investors.[3] The trick of the scheme was that there was no enterprise behind it. The three basic characteristics

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[3] In the grand jury proceedings, the People argued the investments were a Ponzi scheme. They wisely abandoned this argument at trial.

of a Ponzi scheme were (1) a sham investment; (2) regular periodic payments that came from later investors; and (3) credible documentation.

A hard money loan was similar to a bridge loan; it provided money upfront for a short period with strict terms regarding the return of principal and interest.

Malloy testified commercial notes were not securities. Instead, a note was a security when those involved were motivated by something apart from simply securing their rights as lenders, such as wanting an investment to trade to others. A fractionalized interest in a deed of trust could be a security, but not necessarily. To be a security, Malloy explained, there must be an investment in an enterprise that gives the investor an indirect financial benefit with respect to the enterprise's assets. If the note is simply evidence of the lender's standing as a creditor, that is probably not enough to make it a security. On the other hand, if the note is merely the equivalent of a debt security and it can be marketed to other people and does not give the lender a direct interest in assets, it might be a security.

Malloy reviewed some of the paperwork at issue in this case and opined it represented merely commercial real estate lending, that is, secured lending where the collateral was real estate.[4]

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4 Malloy also testified, over objection, that reasonable reliance is required for securities fraud to occur. As discussed in Part II of our Discussion, *post*, this testimony is inconsistent with the trial court's instruction to the jury on the elements of securities fraud and was improper. "It is the court and not the witness which must declare what the law is, it not being within the province of a witness, for example, to testify as to what constitutes larceny or burglary." (*People v. Clay* (1964) 227 Cal.App.2d 87, 98.)

DISCUSSION

I

Sufficiency of the Evidence of Sale of a Security

Except for one count of elder financial fraud (count 49), all the charged counts must involve the sale of a security.

Count 1 alleges a violation of section 25541 by employing a device, scheme, and artifice to defraud in connection with the sale of any security or willfully engaging in any act, practice, or course of conduct which operates or would operate as a fraud or deceit in connection with the sale of a security. Counts 2-4, 6-7, 9, 11-12, 14-20, 22-27, 29-31, 33-42, 44-48, 50-51, 53-61 allege violations of sections 25401 and 25540, subdivision (b) by willfully offering securities for sale by means of a written or oral communication which included an untrue statement of material fact necessary to make the statement made not misleading in light of the circumstances under which it was made.[5] Counts 21, 28, 30, 32, 43, 49, and 52 allege a violation of Penal Code section 368, subdivision (d) by committing fraud with respect to property having a value exceeding $950 where defendants knew or should have known the victim was an elder adult. All of these counts relate to a corresponding violation of section 25401, except count 49, which we discuss in more detail *post.*

It is undisputed that each count involved a *sale*; the question we must answer is whether the various transactions involve a *security*. Defendants contend the transactions were not the sale of securities.[6] Instead, defendants contend, they were investments in

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[5] The jury acquitted Lester of counts 5, 8, 10, and 13. The jury acquitted LaFerte of counts 2, 3, 5, 8, 10, 13, 17, 18, 20-22, 32, 35-38, 40, 43-47, 52, 53, 59, and 60.

[6] Defendants purport to exempt count 11 from their claim, noting that count 11 was an investment in Deer Creek Pines, LLC, and because it was a profit-sharing arrangement, that transaction was a security. We disagree. Although there was evidence the Fowlers invested in Deer Creek Pines, LLC, those transactions were not among the charged

loans that were adequately secured by an interest in real estate. The obligation to pay interest and repay the loan was independent of how the project fared, so these transactions were not securities.

At trial, on the question of whether these transactions were securities, the People argued "[o]f course they are." On appeal they argue, "There is no question that the promissory notes in the present case constitute securities as that term is defined in the Corporate Securities law." But these bald assertions do not hold up under scrutiny. As we explain, given the paucity of evidence as to many of the transactions, we find the People failed to prove many of the counts involve the sale of a security. Insufficient evidence supports these counts.

A. *The Law*

Section 25019 defines a "security" by listing an expansive number of instruments and transactions, including "any note" or "investment contract." This expansive list, however, is not applied literally. (*People v. Figueroa* (1986) 41 Cal.3d 714, 734 (*Figueroa*); see *People v. Schock* (1984) 152 Cal.App.3d 379, 384-385 ["a literal interpretation has been uniformly eschewed when to do so would appear to exceed any legitimate legislative purpose"].) That a note is involved does not necessarily make the transaction the sale of a security. Rather, "the 'critical question' the courts have sought to resolve in these cases is whether a transaction falls within the regulatory purpose of the law regardless of whether it involves an instrument which comes within the literal language of the definition." (*Figueroa,* at p. 735.)

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counts. Count 11 involved the purchase of an interest in loan No. 04010, with the Fowlers receiving a fractionalized interest in the note and deed of trust. This transaction utilized the same disclosure form and servicing agreement as the other investments in loans to Deer Creek Pines. Thus, we consider it along with the other similar loans in our analysis.

In California two tests are used to identify a transaction as a security: the risk capital test and the federal *Howey* test. (*People v. Black* (2017) 8 Cal.App.5th 889, 900.) "A transaction is a security if it satisfies either test." (*Reiswig v. Department of Corporations* (2006) 144 Cal.App.4th 327, 334.) The risk capital test was articulated by our Supreme Court in *Silver Hills Country Club v. Sobieski* (1961) 55 Cal.2d 811, 815 (*Silver Hills*) as: "an attempt by an issuer to raise funds for a business venture or enterprise; an indiscriminate offering to the public at large where the persons solicited are selected at random; a passive position on the part of the investor; and the conduct of the enterprise by the issuer with other people's money."

Because this case did not involve an indiscriminate offering to the public, the trial court determined the risk capital test did not apply and the appropriate test was the federal *Howey* test. The court instructed only on that test. "Federal definitions of securities are also used in California when appropriate in determining whether an investment vehicle is a security [citations] and these do not include a 'public offering' requirement." (*People v. Smith* (1989) 215 Cal.App.3d 230, 237.) Section 25401's prohibition against making material false or misleading statements in the sale of securities "is applicable to the offer or sale of all securities, public or not." (*Smith*, at p. 237.)

The federal *Howey* test was formulated by the United States Supreme Court in *SEC v. W.J. Howey Co., supra*, 328 U.S. 293: "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." This test is a "flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." (*Id*. at p. 299.)

The "common enterprise" prong can be met if there is vertical or horizontal commonality. (*SEC v. R.G. Reynolds Enterprises, Inc*. (9th Cir. 1991) 952 F.2d 1125, 1130 (*Reynolds*).) Vertical commonality is an enterprise common to an investor and the seller, promoter, or some third party and may be established by showing " 'that the fortunes of the investors are linked with those of the promoters.' " (*Ibid.*) Horizontal commonality is an enterprise common to a group of investors. (*Ibid.*)

"The third prong of *Howey* requires an expectation of profits produced by the efforts of others. This requirement is met when ' "the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." ' " (*Reynolds, supra,* 952 F.2d at p. 1131.) An investment scheme offering a fixed rate of return can be an investment contract subject to securities regulation. (*SEC v. Edwards* (2004) 540 U.S. 389, 397.) The profits that must "come solely from the efforts of others," are "the profits that investors seek on their investment, not the profits of the scheme in which they invest." (*Ibid.*) Under the *Howey* test, "[t]here is no reason to distinguish between promises of fixed returns and promises of variable returns for purposes of the test." (*Id.* at p. 394.)

The federal test "requires that the investor 'commit his assets to the enterprise in such a manner as to subject himself to financial loss.' " (*SEC v. Rubera* (9th Cir. 2003) 350 F.3d 1084, 1090.) Thus, a federally insured certificate of deposit is not a security because the purchaser "is virtually guaranteed payment in full." (*Marine Bank v. Weaver* (1982) 455 U.S. 551, 558.) For the same reason, there is not a security where the investor receives adequate collateral. (*Figueroa, supra,* 41 Cal.3d at p. 737.)

The adequacy of collateral or other security is tied to the "critical question" of "whether a transaction falls within the regulatory purpose of the law." (*Figueroa, supra,* 41 Cal.3d at p. 735.) "[W]here the investor receives adequate collateral, no risk capital is contributed to the managerial efforts of the promoter and such business transaction does not come within the Corporate Securities Law." (*People v. Schock, supra,* 152 Cal.App.3d at p. 386; see *Hamilton Jewelers v. Department of Corporations* (1974) 37 Cal.App.3d 330, 336 [diamond sales promotional scheme not a security where sales price of diamond was no greater than value of diamond].)

By contrast, unsecured notes have been held to be securities because of the need to protect the public. (See *People v. Walberg* (1968) 263 Cal.App.2d 286; *People v. Leach* (1930) 106 Cal.App. 442, upheld in *In re Leach* (1932) 215 Cal. 536, 546.) In *People v. Miller* (1987) 192 Cal.App.3d 1505 at page 1510, the appellate court found notes and fractionalized deeds of trust to be securities where the defendant had no means to repay the loans because they "were so far in excess of the value of the secured interests that no resale or foreclosure could recoup more than a few cents on the dollar to the individual lenders."

LaFerte contends the transactions at issue here did not involve securities because they were individualized negotiations between the investor and GCL. In *People v. Black, supra,* 8 Cal.App.5th 889, defendant offered an acquaintance an investment in a real estate deal; the investment was individually negotiated and included a term requiring repayment regardless of whether the development succeeded. The trial court held the promissory note was not a security and the appellate court, applying the *Howey* test, affirmed. (*Id.* at p. 892.) The appellate court found *characteristics* of an investment contract under *Howey*, particularly that the investor put money toward the land deal and expected a profit as a result of Black's efforts. (*Id.* at p. 902.) But the court could not ignore the unique nature of the agreement, particularly the repayment provision, and agreed the note was not a security. (*Ibid*.)

The *Black* court found the transaction at issue was similar to that in *Marine Bank v. Weaver, supra,* 455 U.S. 551. There, two families reached an agreement under which the Weavers pledged a certificate of deposit as security to the other family's slaughterhouse and meat market, Columbus Packing Co. Under the agreement, the Weavers were to receive 50 percent of the profits and $100 a month; the agreement also allowed the Weavers to use the other family's barn and to veto future borrowing by Columbus, thus giving the Weavers a measure of control. (*Id.* at p. 553.) The high court found neither the CD nor the agreement was a security. (*Id.* at p. 555.) It held "this unique agreement, negotiated one-on-one by the parties, is not a security." (*Id.* at p. 560.)

Here, there is no evidence the investments were negotiated one-on-one, or that any of the terms were subject to negotiation. Rather, the investments were offered without much discussion and the same standardized documents were used for all. There was certainly no "unique" agreement as in *Black* or *Marine Bank.* Further, while the investments were not offered to the public, they were available to a large number of investors. The number of investors in Deer Creek Pines was over 80 and as many as 100.

"The Corporate Securities Law does not contain an all-inclusive formula by which to test the facts in every case. And the courts have refrained from attempting to formulate such a test. Whether a particular instrument is to be considered a security within the meaning of the statute is a question to be determined in each case. In arriving at a determination the courts have been mindful that the general purpose of the law is to protect the public against the imposition of unsubstantial, unlawful and fraudulent stock and investment schemes and the securities based thereon." (*People v. Syde* (1951) 37 Cal.2d 765, 768, quoted in *Figueroa, supra,* 41 Cal.3d at p. 736.)

Whether a particular transaction involves a security is a mixed question of fact and law. " 'The definition of a security is a matter of law. It is the judge's duty to instruct the jury concerning that definition: the way in which a security is identified. Whether a particular piece of paper meets that definition, however, is for the jury to decide.' " (*Figueroa, supra,* 41 Cal.3d at pp. 733-734.)

B. *The People's Theory*

The People contend all the transactions at issue involve securities because they all meet the *Howey* test. The People assert this is a case of horizontal commonality "because GCL pooled all of the investors' money in a common trust account held by GCL." They claim Lester's ability to develop the various properties required pooling the investments of all investors. Horizontal commonality requires that "funds of two or more investors must go into ‘a common pool from which all may benefit.’ ” (*Stone v. Kirk* (6th Cir. 1993) 8 F.3d 1079, 1085.) While there was evidence that all of the investors’ funds went into a single trust account, there was *no* evidence the funds invested in the various projects were pooled and used for all the projects or that the fortunes of all the investors in the various projects were tied together. (See *Revak v. SEC Realty Corp.* (2d Cir. 1994) 18 F.3d 81, 87 [horizontal commonality is the tying of each individual investor’s fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits].) Indeed, when in closing argument the prosecutor argued all the funds were commingled, the defense objected and the trial court admonished the jury to disregard the prosecutor’s statement. The investors in the various projects did not share the same risks and benefits; some fared better than others. For example, those who invested in the Bullards Bar project recovered about 75 percent of their investment after the property was sold, while the investors in the Deer Creek Pines project received less than 20 percent after the sale.

Because the evidence does not support the People’s argument that the investments were securities because the money was pooled, we turn to consideration of the individual investments to determine whether they involved securities. This task is made more difficult by the state of the record. Because of the People’s apparent confidence that they would prevail on this issue, they devoted little of the trial to establishing the varying investments were securities. Unlike the defense who offered Professor Malloy as an expert on the issue, the People offered no direct testimony, expert or otherwise, on the issue. In some instances, it is not even clear what the investment was or purported to be.

C. *Osborne Hill (Counts 4, 6, 7, 17-21 23, 31, 32, 33, 36-48, 53, 54, 59, 60)*

Loans for the Osborne Hill development comprise the largest number of counts. For purposes of determining whether these transactions were securities, the transactions can be divided into three categories: (1) the pre-2007 loans secured by a deed of trust on

Osborne Hill; (2) the post-2006 loans secured by a deed of trust on Osborne Hill; and (3) loan No. 2144 on the 33-acre parcel owned by Haidle.

The charged counts involve loans from 2004 to 2008. Because the loans were for two or three years, many of the pre-2007 loans (counts 4, 6, 17, 36-38, 40, 44-47, 53) were paid off and the investors rolled over the principal into a new loan. These early loans appear to have functioned properly as loans secured by adequate collateral in real property, the type of commercial real estate lending Malloy testified about. The interest was paid from loan reserves or new loans so the investor had little risk. The investors were not looking to the efforts of others (the developers) for their profit, so the *Howey* test is not met. Counts 4, 6, 17, 36-38, 40, 44-47, 53 are reversed as the loan transactions were not sales of a *security*.

The situation changed significantly for the later, post-2006 loans (counts 17, 19, 21, 23, 31-33, 39, 41-43, 48, 54, 59, 60) due to additional encumbrances on the property in 2007. In January 2007 there were two new loans against the property in the respective amounts of $500,000 and $400,000. In October 2007 there were two larger loans, $2 million and $1.8 million, respectively. These additional encumbrances raise the issue of whether the later loans had adequate collateral or whether the investors had to look to the success of the Osborne Hill Project (the efforts of others) for their profit. In closing argument, the People argued $6 million was borrowed against property worth only a little over $3 million.

The proper value of Osborne Hill is in dispute. Appraiser Monte Short assessed the value of Osborne Hill on 19 dates between April 2004 through April 2008. He determined the value both “as is” and the aggregate retail sales value, which is the value when development is completely finished and the lot is ready for building. Short’s “as is” values ranged from $2.3 million to $3.2 million; the aggregate retail sale values ranged from $8 million in 2004 to a high of over $11 million in 2006 and declining to under $10 million in 2008.

In determining the "as is" value, Short assumed the property remained in the same condition throughout the time period; he valued only improvements that were in place in 2004. Nevada City Engineering was hired in 2003 or 2004 to work on Osborne Hill. There is no evidence as to how much that work added to the value of property. Some of the work, such as that on the sewer system, did not add value because the sewer plan was rejected and a redesign was required. Thus, the record better supports the "as is" valuation of Osborne Hill, in the $3 million range.

The $4.7 million in loans in 2007 alone exceeded this value of the property. Thus, the investors who invested in the later loans on Osborne Hill did not receive adequate collateral; their investments were dependent on the success of the project, unlike mere commercial loans secured by a sufficient interest in real property. There was vertical commonality for a common enterprise because "the fortunes of the investors [were] linked with those of the promoters [Lester]." (*Reynolds, supra,* 952 F.2d at p. 1130.) As these transactions "fall[] within the regulatory purpose of the law," they are securities even though they "involved a 'beneficial interest in title to property.' " (*Figueroa, supra,* 41 Cal.3d at p. 735.)

Loan No. 2144 was on the 33-acre parcel purchased by Haidle to help Lester finance the rest of Osborne Hill. The loan was for $750,000 of which $300,000 was for the purchase price. Four counts are charged with respect to this loan. (Counts 18, 20, 59, and 60.) Two of the three investors testified they understood they were investing in a Haidle project. Because the loan exceeded the value of the property, the investors were necessarily looking to the success the Haidle project--the efforts of others--for their profit. The connection between Haidle and Lester established vertical commonality for a common enterprise. These transactions are securities.

D. *Deer Creek Pines* (Counts 2, 9, 11, 12, 25, 26, 29, 30, 34, 35, 56-58)

The analysis of the investments in the Deer Creek Pines loans is similar to that of Osborne Hill, as both involve loans for development secured by deeds of trust on real property. There is again a common enterprise as Lester was both the loan broker and the developer. As in the case of Osborne Hill, the *Howey* test is not met unless there was inadequate collateral, in which case the investors had to look to the efforts of the developers for their profit as the land itself would not provide adequate security. The bulk of the charged counts involving Deer Creek Pines relate to the consolidated loan 2216DC for $3.8 million made in May 2009. (Counts 9, 26, 30, 35, 57, 58.) By May 2009 the collateral was inadequate. Short appraised the property at $3.2 million "as is" in May of 2009, while the aggregate retail sales value was almost $20 million. Because Elder was uncertain how the money was used for development, the "as is" value is more appropriate. The amount of the consolidated loan itself was more than the property was worth.

For most of the counts involving the consolidated loan, the investors rolled over prior investments in loans that had not been repaid into the consolidated loan in an attempt to salvage the investment after interest payments had stopped. (Counts 26, 29, 30, 34, 35, 57, 58.) At least one investor, Sally Subbotin, testified she was told she could not get her money out because there were no funds. The "investments" in the consolidated loan were merely attempts by the investors to make the best of a bad situation, the failure of the earlier loans. The objective of the Corporate Securities Law "is to afford those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures whether or not they expect a return on their capital in one form or another." (*Silver Hills*, *supra,* 55 Cal.2d at p. 815.) The investors here had *already* risked their capital before agreeing to invest in the consolidated loan, so that investment does not fall within the regulatory purpose of the law. (*Figueroa*, *supra*, 41 Cal.3d at p. 735.) The record does not establish that, as to the prior investments that were rolled over into the consolidated loan and the charged counts relating to earlier loans (counts 2, 11, 12, 25, and 56), there was inadequate collateral *at the time of the investment*. The People failed to establish these loans on Deer Creek Pines involve the sale of a security. Counts 2, 11, 12, 25, 26, 29, 30, 34, 35, 56, 57, and 58 are reversed.

The one exception to the above analysis is count 9. Misako Edwards invested in Deer Creek Pines for the *first time* in May 2009, when she invested in the consolidated loan. By May 2009, as discussed, there was inadequate collateral. Thus, her investment meets the *Howey* test for the sale of a security.

E. *Investments in Bullards Bar (Counts 3, 22, 24, 27, 28, 55)*

The common enterprise of Bullards Bar is unclear, as are any efforts of others to which the investors may have looked as the source of profits. The People point to the plan to log the property, but there was no evidence the investors knew of that plan. Paul Herman testified he "understood" the property would be developed, but there is no evidence about that understanding or whether it came from defendants. Courtney Berger also claimed the property was to be developed but later clarified his understanding was about a different property. Subbotin, who invested in April 2008 (years later than the others), testified the property was in escrow pending a sale and she expected to get her investment back shortly. The evidence shows only that the investors invested in a loan secured by a deed of trust on real property. As Malloy testified, this type of transaction is a commercial loan secured by an interest in real estate; it is not a security.

Nor does the evidence show inadequate collateral for these loans. Four of the named investors (the Bergers-count 3, the Hermans-count 22, the Johansons-count 24, and the Johnsons-counts 27 and 28) invested in early 2006. Jarrette appraised the property for a sale to Trust for Public Lands in June 2007 at $7,580,000. The trust made an offer in that amount but Browning would not accept it because he did not want to sell to "tree huggers"; he butted heads with Lester over the sale because he wanted to sell to an individual. The property eventually sold for around $3 million in 2014. The delay and reduced price for the sale appear to be due to Browning's refusal to sell at the higher price to the willing buyer and the subsequent decline in the real estate market. The evidence does not establish that GCL attempted to raise money for Bullards Bar with inadequate collateral on the table.

The People failed to establish the loans relating to Bullards Bar were securities. Counts 3, 22, 24, 27, 28 and 55 are reversed.

F. *Garner Investments (Counts 14, 15, 16)*

Joan Garner and her husband made four investments in GCL for a total of $95,000. They received an interest in second deeds of trust on the Auburn Valley Road property that was Lester's home, the Holly Branch property that was LaFerte's residence, and phase two of Rattlesnake Gates, a subdivision. At the time of trial, they still had a lien on Rattlesnake Gates. Although Garner testified she did not know she was investing in defendants' residences, there is little information in the record about these investments. Gates testified she received no information about Rattlesnake Gates. She testified she wrote a check for $95,000 but did not know what the investments were.

Again, these loans appear to be simply loans secured by an interest in real property. Because the People failed to show a common enterprise or inadequate collateral as to the Garner investments, they failed to establish these counts involve the sale of a security. Counts 14, 15, and 16 are reversed.

G. *Linx Group High Street (Counts 50, 51, 52*)

The Hermans and the Shippens began investing with GCL in 1996 and 1998, respectively. In 2007 they invested in an office building on High Street in Auburn. Lester told Paul Herman he needed $700,000 to finish the project; Herman was uncomfortable with that amount, especially since the loan was secured by a second deed of trust. Lester told Herman he would personally guarantee the loan with personal assets and later reassured him he would never lose his principal. Herman trusted Lester to be careful with his retirement money. Herman invested $700,000 from the sale of his house. The Shippens invested $30,000. Lester told Phyllis Shippen he had purchased the property as part of his personal portfolio and they were converting the building into office condominiums. In 2008 the Shippens made a second investment of $20,000. Although the Shippens assumed they had a first deed of trust, when they received the paperwork they learned they had a second deed of trust.

The disclosure statements showed the High Street property had encumbrances of about $5 million at the time the Hermans and Shippens first invested and the property had a market value of $8 million. Short testified that in September 2007 its value was only $4,720,000. In addition, there was an undisclosed mechanic's lien of $87,000. The High Street property was over encumbered at the time GCL offered the investment to the Hermans and the Shippens. Thus, they were dependent on Lester's efforts in turning the building into office condominiums to receive a return on their investment. "The return on any investment which has not been secured with adequate collateral depends on the success of the business. This is true whether the investment contemplates a percentage of the profits or a fixed return." (*Figueroa, supra,* 41 Cal.3d at p. 738.)

Because the Hermans and the Shippens were investing in Lester's business venture without adequate collateral, we find substantial evidence these investments were securities.

H. *Conclusion as to Securities*

In summary, as to Lester, we reverse counts 2-4, 6, 11, 12, 14-17, 22, 24-30, 34-38, 40, 44-47, 50-53, and 55-58 for insufficient evidence that these transactions involve the sale of a security. Because the trial court sentenced Lester to consecutive terms of imprisonment on counts 26, 29, 34, 57, and 58, we remand for resentencing. As to LaFerte, we reverse counts 4, 6, 11, 12, 14-16, 24-30, 34, 55-58 for the same reason. Because the court did not sentence LaFerte to a consecutive term on any of these reversed counts, remand for resentencing is unnecessary. We confine our review of these reversed counts to the question of whether the People proved there was a security and express no opinion as to whether defendants engaged in any fraudulent activity as to these counts.

II

Instructional Error

Lester raises two contentions of prejudicial instructional error. First, he contends the trial court erred in failing to instruct that reliance and causation are elements of securities fraud. Second, he contends the court erred in failing to instruct completely and correctly on the definition of a security. LaFerte joins these contentions.

Instructional error is a question of law that this court reviews de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

A. *Elements of Securities Fraud*

Section 25401 provides: "It is unlawful for any person to offer or sell a security in this state, or to buy or offer to buy a security in this state, by means of any written or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading."

The trial court instructed the jury in the language of section 25401 and then added:

"In order to prove this crime, the People must show beyond a reasonable doubt:

"1. Defendants offered for sale or sold a security in this state.

"2. The offer for sale or sale was made by means of an oral or written communication.

"3. Such oral or written communication either:

"a. Included an untrue statement of material fact;

"OR

"b. Omitted to state a material fact which omission made a statement misleading;

"AND

"4. At the time the communication was made, defendant acted with actual knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or with criminal negligence in failing to investigate and discover same."

The court instructed on the meaning of "willfully" and "criminal negligence." The court further instructed: "The finding of Fraud in the Sale of a Security or Fraudulent Securities Scheme do [*sic*] not require that any particular investor relied on any false or misleading information disseminated by a defendant either as part of a device, scheme or artifice to defraud or as part of an act, practice or course of business which operates, or would operate as a fraud."

"Sections 25401 and 25501 differ from common law negligent misrepresentation in that: (1) proof of reliance is not required, (2) although the fact misrepresented or omitted must be 'material,' no proof of causation is required, and (3) plaintiff need not plead defendant's negligence." (*Bowden v. Robinson* (1977) 67 Cal.App.3d 705, 715.)

Lester argues these elements apply only to civil actions, not criminal prosecutions. He relies on *People v. Baumgart* (1990) 218 Cal.App.3d 1207, disapproved in *People v. Simon* (1995) 9 Cal.4th. 493. *Baumgart* quoted the elements of section 25401 from *Bowden*, but the issue in *Baumgart* was only the third element, whether criminal negligence was required for a violation of section 25401 or whether it was a strict liability offense. (*Baumgart,* at p. 1218.) The *Baumgart* court stated: "It is clear that the court in *Bowden*, in referring to strict liability was discussing the elements of and defenses to a civil action for violation of section 25401, which civil action and defenses are set out in section 25501. That section has no application to a *criminal prosecution* for a willful violation of section 25401." (*Id.* at p. 1221.) Lester ignores that the *Baumgart* court was referring to *Bowden's* discussion of strict liability, not the issues of reliance and causation. (*Ibid*.)

Our Supreme Court decided the necessary mental state for a criminal violation of section 25401 in *People v. Simon, supra,* 9 Cal.4th 493. The court concluded that the offense was not one of strict liability, "knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them, are elements of the criminal offense described in section

25401." (*Id.* at p. 522.) Although *Simon* disagreed with *Bowden* and *Baumgart* on the scienter issue, nothing in *Simon* affects *Bowden* on the issues of reliance or causation. The instruction given here is consistent with *Simon* on the mental state required.

Lester contends that section 25401 requires reliance and causation based on his comparison of that section to federal regulations. He reasons as follows. The language of section 25401 was revised during this trial to mirror that in Security and Exchange Commission rule 10b-5.[7] The revised statute read: "It is unlawful for any person, in connection with the offer, sale, or purchase of a security, directly or indirectly, to do any of the following: [¶] (a) Employ a devise, scheme, or artifice to defraud. [¶] (b) Make an untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading. [¶] (c) Engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person."[8] (Stats. 2013, ch. 335, § 6.) In revising the statute, the Legislature intended to "update the anti-fraud language in California's securities law to ensure consistency with federal anti-fraud language." (Sen. Bank. & Finan. Inst. Com. Analysis of Sen. Bill No. 538 (2013-2014 Reg. Sess.) Apr. 3, 2013.) An action under rule 10b-5 requires proof of both reliance and causation. (*Dura*

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[7] Rule 10b-5 provides: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, [¶] (a) To employ any device, scheme, or artifice to defraud, [¶] (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or [¶] (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." (17 C.F.R. § 240.10b-5.)

[8] The statute was subsequently amended to its current version, quoted *ante*. (Stats. 2015, ch. 190, § 19.)

Pharmaceuticals, Inc. v. Broudo (2005) 544 U.S. 336, 341–342.) Therefore, Lester argues, an action under section 25401 also requires reliance and causation.

This argument fails to persuade. Nothing in the legislative history of section 25401 supports this argument. There is no mention of adding the elements of reliance and causation to an action under section 25401. To accept Lester's argument, we would have to find that the Legislature intended a significant change in the *elements* of the offense from existing caselaw (*Bowden* and *Baumgart)* without so much as a mention of the change in either the legislative history or the language of the statute. Lester offers no authority to show that reliance or causation have ever been elements of a violation of section 25401.

Indeed, commentators and treatises have included neither reliance nor causation in the elements of a violation of section 25401. (See, e.g., Olson, Cal. Business Law Deskbook (2018) § 41:6 ["In order to prove a criminal violation of section 25401 the following elements must be proven beyond a reasonable doubt: [¶] 1. That a security was offered or sold in California; [¶] 2. That such offer or sale was made by means of a written or oral communication; [¶] 3. That such communication either: (a) included an untrue statement of a material fact or facts; or (b) omitted to state a material fact or facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and [¶] 4. That such conduct was either (a) knowing; or (b) of a nature that the promoter should have known that the misrepresentation or omission was made and of its misleading character"]; 1 Marsh & Volk, Practice Under the Cal. Securities Laws (rev. ed. 2019) § 14.03[7] ["Corp. Code §§ 25401 and 25501 do not require that the plaintiff demonstrate any connection between the false or misleading statement and the damage suffered by the plaintiff"].)

The absence of reliance or causation as elements of a violation of section 25401 is explained by the nature of the crime. Some crimes are concerned with the means by which they are committed, rather than the end result of the crime. One example is forgery. "The real essence of the crime of forgery, however, is not concerned with the end, i.e., what is obtained or taken by the forgery; it has to do with the means, i.e., the act of signing the name of another with intent to defraud and without authority, or of falsely making a document, or of uttering the document with intent to defraud." (*People v. Neder* (1971) 16 Cal.App.3d 846, 852.) Another example is Medi-Cal fraud, Welfare and Institutions Code section 14107, where the essence of the crime is "the intentional submission of a false or fraudulent claim." (*People v. Drake* (1996) 42 Cal.App.4th 592, 597.) Similarly, the essence of securities fraud is how it is committed, or the *means*, i.e., the act of misrepresenting or omitting a material fact to sell a security, rather than the *end*, i.e. the loss to the investor due to the fraudulent sale.

B. *Definition of Security*

Lester contends the instruction on the definition of a security was incomplete and incorrect. He finds a number of deficiencies in the instruction given.

The trial court instructed the jury as follows:

> "The term 'security' includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, transferrable share, investment contract, certificate of deposit for a security, or, in general, any interest or instrument commonly known as a 'security.' 'Security' also includes an investment contract. An investment contract is a transaction in which a person entrusts money or other capital to another with the expectation of deriving a profit, income, or other financial benefit from a business enterprise, the failure or success of which is dependent upon the managerial efforts of other persons.
>
> "In order to prove the existence of a security in the form of an investment contract each of the following elements must be proved: [¶] 1. That a person entrusted money or capital to another; [¶] 2. That the person who entrusted the money or capital to another did so with the expectation of receiving a profit, income or some other financial benefit from the business enterprise; AND [¶] 3. That the failure or success of the business enterprise was dependent upon the managerial efforts of persons other than the person who entrusted his money or other capital.
>
> "In determining whether an interest is a security you should look through the mere form to the substance of the transaction. You should consider all evidence of the facts

surrounding the transaction to ascertain the true intent of the parties, their mutual expectations and potentialities of the rights acquired by the Purchaser. The mere name of the instrument or interest is of little consequence in determining whether the interest created is a security, no matter how described."

"In assessing a claim of instructional error, we examine the instructions as a whole. The test we apply is whether there is a reasonable likelihood the jurors would have understood the instructions in a manner that violated a defendant's rights. [Citation.] In this regard, we presume that jurors are intelligent individuals who are capable of understanding instructions and applying them to the facts of the case before them." (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1246, abrogated on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

First, Lester contends the instruction told the jury that the investments at issue were in fact investment contracts. He contends this is problematic because the definition of investment contract was misleading. He objects to the portion of the instruction that defines an investment contract as a transaction where one entrusts money or other capital with "the expectation of deriving a profit, income, or other financial benefit from a business enterprise." Confusingly, Lester appears to argue that "income" should be not included as an expectation in the instruction because "income" is derived from one's own efforts and the *Howey* test requires profits from the efforts of others. Here, the income at issue is the fixed rate of interest offered by GCL. As *SEC v. Edwards, supra,* 540 U.S. 389 makes clear, "profits" for purposes of the *Howey* test are "the profits that investors seek on their investment, not the profits of the scheme in which they invest." Under the *Howey* test, "[t]here is no reason to distinguish between promises of fixed returns and promises of variable returns for purposes of the test." (*Id.* at p. 394.) Thus, the "income" at issue here, the promised fixed interest rate, constitutes "profits" under the *Howey* test.

Next, Lester contends "other financial benefit" is too vague and illustrates his argument with an example where a business pays its neighbor to paint its building to eliminate an eyesore and improve property values. Lester fails to explain, however, how this example or the alleged vagueness of "other financial benefit" affects the evidence in *this* case. Here, the evidence showed the investors expected a monetary return. Nothing shows the jury was led astray by the term "other financial benefit."

Finally, Lester contends the instruction incorrectly included the term "business enterprise," which comes from the risk capital test of *Silver Hills*, rather than the term "common enterprise" from the *Howey* test. He contends the result was to negate the element of vertical commonality.

The defense proposed two instructions on the definition of a security; one for the *Howey* test and one for the risk capital test. The trial court rejected these instructions and gave the one proposed by the People. The defense instruction used the same phrase with "the expectation of deriving a profit, income, or other financial benefit from a business enterprise" to which Lester now objects. Further, it did not include vertical or horizontal commonality as part of the definition of a security.

"The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction." (*People v. Lucero* (2000) 23 Cal.4th 692, 723.) Defendants made a deliberate choice to request the exact language they now claim was error. In closing argument, Lester's counsel chided the prosecutor for omitting from her definition of security the phrase "income or some financial benefit from a business enterprise" and discussed with the jury the difference between commercial real estate and a "business enterprise." Having agreed to the language now in dispute, defendants may not challenge it on appeal.

III

Sufficiency of the Evidence of Material Misrepresentations or Omissions

Lester contends there is insufficient evidence to support any of the convictions. We have already addressed the issues of whether the transactions at issue constituted securities and whether the elements of reliance and causation must be proved. Lester also contends there was insufficient evidence of material misrepresentations or omissions. LaFerte joins this contention.

The standard of review of a criminal conviction challenged as lacking substantial evidence is well established. "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence that is, evidence which is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

"Section 25401 only applies to an 'untrue statement of material fact' or an omission to state a 'material fact *in order to make the statements made,* in light of the circumstances under which they are made, *not misleading*.' Section 25401 does not apply to simple nondisclosure." (*Bowden v. Robinson, supra,* 67 Cal.App.3d at p. 717.) Under both state and federal securities law, " ' "[a] fact is material if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision." ' " (*People v. Butler* (2012) 212 Cal.App.4th 404, 421.) "The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." (*TSC Industries, Inc. v. Northway, Inc*. (1976) 426 U.S. 438, 445.)

A. *Osborne Hill*

1. *Loan No. 2202 (Counts 23, 31, 32, 41, 42 43, and 48)*

In October 2007 five investors invested in loan No. 2202 on Osborne Hill (counts 23, 31, 41, 42, 48). As discussed in Part I F, *ante*, at that time, Osborne Hill was valued in the $3 million range with $4.7 million in loans. The disclosure statements, however, indicated the property had a value of $4 million and encumbrances of $3.5 million, giving an LTV ratio of 89 percent. This LTV ratio is significantly higher than the 50 percent recommended for raw land and higher even than the 80 percent recommended for owner-occupied single family residences, making it a risky loan. Here, the value of the loans was greater than the true value of the property, making the collateral inadequate and the investment extremely risky. In hard money loans, the investor looks to the collateral for protection, so the amount of equity in the property is important to the investor. One investor testified that Lester explained that hard money loans are a bit risky but you do not have to worry because if it ends up failing, you own a piece of property. A significant misrepresentation as to the value of the property and existing loans is a material misrepresentation.

The People presented other evidence of misrepresentations and omissions. In particular, there was evidence that GCL failed to disclose the presence of toxic substances on the property and the need for cleanup before development could begin. Lester makes light of the toxics issue, citing Elder's testimony that it was just "a line item" in development. He notes the People failed to present evidence of the cost to clean up the property or the diminution in value of the property due to presence of toxic substances. But there was evidence that Osborne Hill had concentrations of arsenic up to 3100 milligrams per kilogram, greatly in excess of the 500 milligrams per kilogram threshold for a substance to be considered hazardous. Further, Lester's attempt to downplay the importance of the presence of toxic substances is at odds with his statement that he spent thousands fighting the DTSC. And it is uncontested that the issue of cleaning up the toxics was never resolved. From this evidence, the jury could conclude the failure to disclose the presence of toxic substance and the need for cleanup before development was a material omission.

The People also relied on GCL's failure to disclose that Lester was a partner in the entity that was the borrower and that Lester set the market value for the property without an appraisal. We need not determine whether these alleged misrepresentations and omissions were material as the evidence concerning the misrepresentations about the adequacy of the collateral and the omission of information about the presence of toxic substances is sufficient to sustain these counts.

Counts 32 and 43 charged elder fraud (Pen. Code, § 368, subd. (d)) relating to loan No. 2202. That subdivision makes it a crime for a non-caretaker to violate any provision of law proscribing fraud with respect to the property of an elder adult if the violator knows or reasonably should know the person is an elder adult. (*Ibid*.) An elder is one 65 years of age or older. (*Id.*, subd. (g).) Defendants do not challenge the sufficiency of the evidence as to the victims' ages or the proof that defendants knew or should have known the victims were elder adults. Because there was sufficient evidence of securities fraud, there was sufficient evidence to sustain counts 32 and 43.

2. *Loan No. 2203 (Counts 7, 19, 21, 33, 39, and 54)*

Five investors contributed to loan No. 2203 on Osborne Hill; four in October 2007 (counts 7, 19, 33, 39) and one in 2008 (count 54). As with loan No. 2202, the market value of the property is overstated and the dollar amount of encumbrances is understated in the disclosure statements. The market value of the property is set at $3.8 million and the encumbrances at either $2.58 million for an LTV ratio of 67.89 percent or $3.16 million for an LTV ratio of 88.42 percent. In all cases, the disclosure statement indicates there is some equity in the property to provide security for the loan when in fact there was no equity and the collateral was inadequate. For the same reasons as loan No. 2202, there was sufficient evidence of a material misrepresentation and a material omission as to the presence of toxic substances.

Count 21 charged elder fraud (Pen. Code, § 368, subd. (d)) relating to loan No. 2203. Defendants do not challenge the sufficiency of the evidence as to the victim's age or that defendants knew or should have known the victim was an elder adult. Because there was sufficient evidence of securities fraud, there was sufficient evidence to sustain count 21.

3. *Loan No. 2144 (Counts 18, 20, 59, 60)*

Three investors invested in loan No. 2144; one had two investments therein. This loan was for the development of the 33-acre parcel owned by Haidle. Again, the disclosure forms contain material misrepresentations. The market value of the property is listed as $1.2 million, although Haidle testified he had spent only $5,000 beyond the purchase price of $300,000. Further, page 3 of the disclosure forms listed Haidle's income at $24,000 a month, which Haidle testified was not even close to his actual income. The effect of overstating both the value of the property and Haidle's income was to give the investors a distorted view of the loan's risk. As with loan Nos. 2202 and 2203, the misrepresentations on the disclosure forms and the omission of information about the presences of toxic substances and the need for cleanup were material. Sufficient evidence supports counts 18, 20, 59 and 60.

B. *Deer Creek Pines Loan No. 2216DC (Count 9)*

There was sufficient evidence of a material misrepresentation or omission as to count 9. This count was the 2009 investment in Deer Creek Pines. The disclosure statement indicated the property had a value of $7.6 million with loans of $2.8 million. As explained *ante*, this disclosure significantly overstated the property's value, which was closer to $3 million, and understated the encumbrances, which were $3.8 million, misrepresenting the risk. Further, by 2009, all interest payments had stopped and this material fact was not disclosed to the investor.

C. *Melody Road (Count 49)*

Count 49 is distinct from the other counts. It is a count for elder financial fraud but is not tied to any charge for security fraud. Tom Rogers invested in a project called Melody Road to complete houses by a builder named Fikes. Rogers did not get his money back. Rogers called Lester who told Rogers he would give him a note but that GCL was bankrupt.

The house on Melody Road was sold to David Lester, Lester's son, in August 2008. Robin Zoch served as the escrow officer for the sale. She testified GCL held a first lien on the property with multiple investors assigned $412,500, including an assignment of $40,000 in favor of Rogers. The sale was for $460,000 of which GCL received $445,000 plus interest. A loan payoff document for the sale shows that of the sale's proceeds only $247,453.43 was used to pay back the investors. The remainder was used for a variety of purposes, including paying vendors for painting, paving, and septic, paying off a car, and paying off David and Nicole Lester's credit cards (Lester's son and daughter-in-law). From this evidence the jury could reasonably conclude defendants used sales proceeds for certain personal expenses rather than to repay the investors who held the security interest and that the defendants' actions constituted theft or fraud. Defendants do not challenge the sufficiency of the evidence as to the victim's age or defendants' knowledge thereof. There is sufficient evidence to sustain this count.

D. *Linx Group High Street Loan No. 2200 (Counts 50, 51, 61)*

Defendants do not specifically challenge the sufficiency of the evidence of material misrepresentation or omission as to the counts relating to High Street office building. Lester does argue as to count 61 (the Hermans' investment), "The prosecution introduced no evidence that the value of this property was somehow inflated." Short, however, testified as to the value of this property. As discussed, his testimony established the disclosure statements greatly overstated--by almost double--the value of the property. In reviewing the sufficiency of the evidence, we "review the *whole record* in the light most favorable to the judgment below." (*People v. Johnson, supra,* 26 Cal.3d at p. 578, italics added.) As with the Osborne Hill loans, this significant misrepresentation as to the riskiness of the loan was material. Substantial evidence supports counts 50, 51, and 61.

E. *Count 1: Scheme, Device or Artifice to Defraud*

Count 1 charged a violation of section 25541 which criminalizes the use of any scheme to defraud in connection with the offer or sale of a security. (§ 25541, subd. (a).)[9] Lester contends his argument that there was no material misrepresentation or omission demonstrates "that there was no scheme, device, or artifice to defraud, and no fraud committed, the evidence is insufficient to support conviction on this count, which must be reversed." We have already rejected this argument as to several counts and reject it here as well.

Further, the People did not rely solely on misrepresentations and omissions to prove count 1. They argued there was a pattern of "misleading deceitful conduct" that included (1) calling investors to ask if they had money to invest without disclosing the riskiness of the loan, the involvement of DTSC, who had set the market value of the property, or the identity of the borrower; (2) using complicated paperwork that was simply sent through the mail without going over it with the investors, many of whom did not understand it; and (3) offering false assurances that the investors' money was safe. Defendants do not challenge the sufficiency of this evidence.

IV

Sufficiency of the Evidence of Aiding and Abetting (Count 9)

LaFerte contends there is insufficient evidence that she aided and abetted Lester in counts 9, 27, 28, 29, 30, and 58. We have reversed counts 27, 28, 29, 30, and 58 on other grounds so we need consider only count 9. Count 9 was Edwards's investment in Deer

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[9] Section 25541, subdivision (a) states that "[a]ny person who willfully employs, directly or indirectly, any device, scheme, or artifice to defraud in connection with the offer, purchase, or sale of any security or willfully engages, directly or indirectly, in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the offer, purchase, or sale of any security" is guilty of a crime.

Creek Pines, loan No. 2216DC in 2009. LaFerte contends Edwards did not testify about LaFerte or provide any evidence LaFerte knew or intended to assist Lester.

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) "Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment." (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 329.)

There was evidence about LaFerte's substantial role at GCL. She was the CFO and in charge when Lester was not present. Lester or LaFerte provided the information for the disclosure forms. The paperwork was reviewed by LaFerte. Edwards testified that most of the time she dealt with Sue or Susan. Hinman was referred to as Sue O, while LaFerte was Susie. Since Edwards used the name Susan, the jury could infer she meant LaFerte because Hinman's first name was Suzanne. This inference is especially strong in 2009, the time of Edwards's investment in loan No. 2216DC, as Hinman was then no longer working at Gold County Lenders.

There is substantial evidence LaFerte aided and abetted count 9.

V

Multiple Convictions for Same Victim and Same Project

LaFerte contends multiple convictions for violating section 25401 cannot be imposed for counts involving the same victim and the same project. She contends the multiple convictions violate the rule against fragmenting offenses; the doctrine of continuing offenses, and the rule of *People v. Bailey* (1961) 55 Cal.2d 514. Although *Bailey* was limited in *People v. Whitmer* (2014) 59 Cal.4th 733, *Whitmer* refused to apply its holding retroactively (*id.* at p. 742), so the *Bailey* rule applies here. Lester joins in this argument.

This contention relates to counts 6 and 7 (Osborne Hill), 11 and 12 (Deer Creek Pines), 25 and 26 (Deer Creek Pines), and 56 and 57 (Deer Creek Pines). We have reversed all of these counts except count 7. Therefore, there are no multiple convictions and we need not consider this argument.

VI

Whether Section 25401 and Section 25541 are Different Statements of Same Offense

LaFerte contends count 1 must be reversed because it is merely a different statement of the same offense as counts 2 through 61. She contends the gravamen or actus reus of both sections 25401 and 25541 is the same: fraud in the sale of securities. She further argues the People's theory of section 25541 mirrored their theory for section 25541. Lester joins in this contention.

Penal Code section 954 provides in part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court . . . ."

In *People v. Vidana* (2016) 1 Cal.5th 632, our Supreme Court considered whether a defendant could be convicted of both grand theft by larceny and embezzlement for the same course of conduct. This determination turns on the intent of the Legislature. (*Id*. at p. 637.) In 1927 the Legislature amended the Penal Code to consolidate the crimes known as larceny, embezzlement and obtaining property under false pretenses, into one crime, theft (Pen. Code § 484), and provided that statutes that mentioned larceny, embezzlement, or stealing should be read as if the word "theft" were substituted (Pen. Code, § 490a). Based on this legislative action, the court determined larceny and embezzlement are different statements of the same offense. (*Vidana*, at p. 648.) The court accepted the argument that: " 'The most reasonable construction of the language in section 954 is that the statute authorizes multiple convictions for different or distinct offenses, but does not permit multiple convictions for a different statement of the same offense when it is based on the same act or course of conduct.' " (*Id.* at p. 650.)

LaFerte does not provide any analysis or explanation why the Legislature may have intended sections 25401 and 25541, two statutes added at the same time (Stat. 1968, ch. 88, § 2, pp. 279, 285), to be different statements of the same crime. Section 25401 requires a written or oral untrue statement of material fact or a material omission in connection with an offer, sale, or purchase of a security, while section 25541 requires the use of a device, scheme, or artifice to defraud. The trial court instructed the jury that a "device, scheme, or artifice" means "any deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another or by which someone intends to deprive another of something of value." It further instructed the jury that section 25541, unlike section 25401, required the specific intent to defraud. Because only section 25541 is a specific intent crime, multiple violations of section 25401 will not always constitute a violation of section 25541.

Further, the People's theory of violation was not the same as to the two statutes. As explained in Part III.E., *ante*, the People did not rely solely on material misrepresentations or omissions to prove the violation of section 25541. They offered other evidence of a pattern of deceitful conduct: calling investors for investments without full disclosure; using complicated paperwork that was not explained; and giving false assurances.

Section 25401 and 25541 are not different statements of the same offense. Defendants were properly convicted of both crimes.

VII

Prosecutorial Misconduct

Lester contends there were numerous instances of prejudicial prosecutorial misconduct. He contends the prosecution shored up the weaknesses in its case by mischaracterizing the evidence to mislead the jury. LaFerte does not join in this argument.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841) "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ' "an admonition would not have cured the harm caused by the misconduct." ' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

"We review the trial court's rulings on prosecutorial misconduct for abuse of discretion." (*People v. Peoples* (2016) 62 Cal.4th 718, 792.)

A. *Broker's Commission*

Lester contends the People elicited from investors the amount of the broker's commission shown on the disclosure form without indicating the commission was for the total amount of the loan, not the particular investor's fractionalized interest. He questions whether the broker's commission was even relevant.

LaFerte objected to this practice at trial. Because defendants raised several other claims of prosecutorial misconduct at that time, the court asked that the objections be put in writing. Undaunted, the People continued, eliciting from Thomas Pearce that he invested $100,000 in Osborne Hill and the broker's commission was $50,000. On cross-examination, the defense clarified the $50,000 commission was for the total $2 million loan, not just Pearce's investment. A former GCL employee testified on cross-examination that the broker's commission was on the total note. In closing, LaFerte argued the People tried to mislead the jury about the amount of the commission, knowing full well it was the aggregate commission for the entire loan, not the commission on the individual investment.

The People argue on appeal that the broker's commission was relevant because it showed the many roles Lester played and his undisclosed conflict of interest. Tellingly, they do not address the main point, their failure at trial to acknowledge that the commission shown on the disclosure form was for the total note, not the individual investment. Due process requires that a prosecutor correct a false or misleading impression of the evidence. (*People v. Westmoreland* (1976) 58 Cal.App.3d 32, 42.)

"Prosecutorial misconduct, however, does not require reversal unless it subjects the defendant to prejudice." (*People v. Warren* (1988) 45 Cal.3d 471, 480.) Here there was no prejudice because the defense unequivocally corrected the evidence as to the broker's commission and turned the People's failure to do so to its advantage in closing argument. Although the burden of clarification should not have been on the defense, because the defense successfully carried that unwarranted burden, there was no prejudice.

B. *Misrepresentation of Appraisal Amount*

During the prosecutor's cross-examination of appraiser Short, Short testified the highest value of Osborne Hill was $3,293,000 in December 2005 and the lowest value was $2,804,000 in April 2008. The prosecutor then asked: "The change in value from 3.2 million to roughly 2 million, was that based on fluctuations in the economy?"

LaFerte objected: "Your Honor, she's misstating the evidence. You can't say 2.8 is roughly 2 million." The trial court sustained the objection. The prosecutor again asked the lowest value and Short answered and then testified the change in value was due to changes in the real estate market for development land.

Lester contends the prosecutor was attempting to imply a greater decline in value than what actually occurred. Again, he fails to show prejudice as his objection was sustained and the correct figure for the lowest value of Osborne Hill was again put in evidence. Whatever the prosecutor was attempting to imply, the jury was presented with the accurate figures.

C. *Predatory Lending Practices Chart*

In his report prepared for trial, defense expert Malloy spoke of predatory lending practices concentrated in the retail lending market that contributed to the meltdown of the real estate market. On cross-examination, the prosecution asked about the report and claimed that Malloy "accredited" the mortgage meltdown to predatory lending practices. Malloy objected that misstated his report; he said these practices contributed to the melt down not that the melt down was accredited to them. The prosecutor prepared a chart on such practices. Lester objected to having Malloy complete the chart; arguing the prosecutor should do so. The objection was overruled.

The prosecutor then drew on a board under the heading "Predatory Lending Practices." First, the prosecutor wrote "misleading information." Malloy corrected her; it was misleading information *about the mortgage*, particularly about the interest rate reset. Second, she wrote "aggressive sales tactics." Malloy explained borrowers were pressured into taking these loans; they were told it was their obligation to protect their families. The third point was "taking advantage of borrower's lack of information about loan terms and consequences." Another factor was stated income loans, where the borrower simply wrote a letter acknowledging his income. Another contributing factor was inflated appraisals. Lester then raised a standing objection "to what she calls her exhibit." The court noted the objection.

On redirect, Malloy clarified the target of predatory lending practices was the borrower. These practices did not target investors.

Lester contends that since Malloy had written about retail home buyers, not investors in projects secured by commercial real estate, the prosecutor and her chart misrepresented the evidence. Lester did not, however, object on this basis at trial and did not request the jury be admonished to disregard the prosecutor's chart. Therefore, he has forfeited this claim of prosecutorial misconduct on appeal. "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Price* (1991) 1 Cal.4th 324, 447.) Although the trial court overruled other objections, we disagree an objection would have been futile. A timely objection would have allowed the court to admonish the jury that Malloy's discussion of predatory lending practices applied only to borrowers in the retail real estate market. Any prejudice, however, was cured when the defense made this point, clarifying that predatory lending practices target the borrower, not an investor in the loan.

D. *Ponzi Scheme*

The prosecutor also prepared a chart about Ponzi schemes on which she wrote (1) marketing a sham investment; (2) putative earnings; and (3) consistent and credible sham documentation. She asked Malloy if a Ponzi scheme was the only way securities fraud could be committed and he said no.

Lester asserts there was no evidence the transactions at issue constituted a Ponzi scheme because they were not sham investments, but real investments in real estate, adding that the People did not even argue there was a Ponzi scheme. He argues the sole purpose of the chart was to misrepresent the evidence and associate defendants with someone like Bernie Madoff, “one of the biggest swindlers of all time.” He further contends he has not forfeited this contention by failing to object at trial. He claims an objection would have been futile because the trial court had overruled his previous objections to prosecutorial misconduct.

Lester has forfeited his claim by failing to object and request an admonishment. We see no evidence of futility. Further, we find no prejudice. Lester does not contend the chart’s elements of a Ponzi scheme are incorrect or that the chart misrepresented Malloy’s testimony. The prosecutor spent little time on the issue other than to elicit that a Ponzi scheme was not the only form of securities fraud. It was agreed there was no Ponzi scheme here because the elements were not met. The brief use of the chart, which simply repeated Malloy’s testimony on direct examination, did not prejudice Lester.

VIII

Penal Code Section 12022.6 Enhancement

The trial court added three years to each defendant’s sentence for the enhancement of Penal Code section 12022.6, subdivision (a)(3). At the time of the crimes and sentencing that subdivision provided: “When any person takes, damages, or destroys any property in the commission or attempted commission of any felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows: . . . (3) If the loss exceeds one million three hundred thousand dollars ($1,300,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of three years.” (Stats. 2010, ch. 711, § 5.)

Effective January 1, 2018, Penal Code section 12022.6 (section 12022.6) was repealed by its own terms: “It is the intent of the Legislature that the provisions of this section be reviewed within 10 years to consider the effects of inflation on the additional terms imposed. For that reason this section shall remain in effect only until January 1, 2018, and as of that date is repealed unless a later enacted statute, which is enacted before

January 1, 2018, deletes or extends that date." (Former § 12022.6, subd. (f).) The statute contained no saving clause limiting the scope of the repeal. The Legislature did not enact a new version of section 12022.6 before January 1, 2018.[10]

Defendants contend that since their convictions are not yet final, they are entitled to the ameliorative effect of the repeal of section 12022.6 under the rule of *In re Estrada* (1965) 63 Cal.2d 740. In *Estrada*, our high court held: "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id.* at p. 748.) Defendants contend the enhancement must be stricken.

The question is one of legislative intent. "[D]id the Legislature intend the old or new statute to apply?" (*In re Estrada, supra*, 63 Cal.2d at p. 744.) "The rule in *Estrada*, of course, is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent." (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.)

The People contend the repeal of section 12022.6 does not operate retroactively and this case is governed not by *Estrada*, but instead by *In re Pedro T.* (1994) 8 Cal.4th 1041 (*Pedro T.*). In *Pedro T.*, the court considered an amendment to the Vehicle Code that increased punishment for vehicle theft and further provided the lesser punishment would be reinstated by 1993 unless the Legislature otherwise directed. The Legislature did not so direct. The court found a defendant who committed vehicle theft during the period of increased punishment but whose conviction was not final at the time of the sunset provision, could be sentenced to the increased punishment. (*Id.* at p. 1043.) It found an express savings clause was not required: "what *is* required is that the

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10 The Legislature attempted to re-enact Penal Code section 12022.6 in Assembly Bill No. 1511. On or about September 30, 2018, Governor Edmund G. Brown, Jr., vetoed the legislation because, unlike earlier versions, it did not contain a sunset provision.

Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it. We believe the very nature of a sunset clause, as an experiment in enhanced penalties, establishes--in the absence of evidence of a contrary legislative purpose--a legislative intent the enhanced punishment apply to offenses committed throughout its effective period." (*Id.* at p. 1049.)

The People contend the Legislature has demonstrated its intention with sufficient clarity here. In amending section 12022.6 in 2007, the Legislature stated: "It is the intent of the Legislature that the amendments to Section 12022.6 of the Penal Code by this act apply prospectively only and shall not be interpreted to benefit any defendant who committed any crime or received any sentence before the effective date of this act." (Stats. 2007, ch. 420, § 2.)

LaFerte notes that *People v. Nasalga, supra,* 12 Cal.4th 784, held section 12022.6 was subject to the *Estrada* rule. In *Nasalga,* defendant stole $124,000 worth of checks. After her conviction for felony grand theft, her sentence was enhanced with a three-year term pursuant to former section 12022.6, subdivision (b); at the time of the offense, the threshold for the three-year enhancement was a loss of $100,000. That section was subsequently amended to make the threshold for a three-year enhancement a loss of $150,000. (*Nasalga*, at pp. 788-789.) The court noted there was no savings clause nor was there anything in the legislative history demonstrating an intent to apply the new amendments prospectively only. (*Id.* at pp. 794, 795.) Because the Legislature failed to express its intent that the amendments apply prospectively only, the court concluded the new higher threshold applied to defendant. (*Id.* at pp. 797-798.)

Nasalga was decided in 1996, before the 2007 amendments to section 12022.6 that indicated the amendments applied prospectively only. Defendants point to no evidence that the Legislature intended the repeal of section 12022.6 to ameliorate punishment for offenses committed during its effective period. (*Pedro T., supra,* 8 Cal.4th at p. 1049.) Indeed, defendants do not discuss *Pedro T.*

We find the Legislature has demonstrated its intent with sufficient clarity to show the repeal of section 12022.6 applies prospectively only. (*Pedro T., supra,* 8 Cal.4th at p. 1049.) Thus, the repeal of section 12022.6 does not apply to reduce defendants' punishment. The trial court properly imposed the three-year enhancements of section 12022.6, subdivision (c).

DISPOSITION

As to defendant Lester, the convictions on counts 2, 3, 4, 6, 11, 12, 14, 15, 16, 17, 22, 24, 25, 26, 27, 28, 29, 30, 34, 35, 36, 37, 38, 40, 44, 45, 46, 47, 50, 51, 52, 53, 55, 56, 57, and 58 are reversed. In all other respects, the judgment is affirmed. The matter is remanded to the trial court for resentencing. Upon completion of resentencing, the trial court shall prepare an amended abstract of judgment reflecting the judgment as modified and defendant's new sentence and forward a certified copy to the Department of Corrections and Rehabilitation.

As to defendant LaFerte, the convictions on counts 4, 6, 11, 12, 14, 15, 16, 24, 25, 26, 27, 28, 29, 30, 34, 55, 56, 57, and 58 are reversed. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the judgment as modified and to forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Mauro, J.